82-916

No.

In the
Supreme Court of the United States

RICHARD A. HERBERT,
Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT

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QUESTIONS PRESENTED FOR REVIEW

I. Should the required records exception to the fifth amendment be applied in a grand jury proceeding?

II. Have the records sought by the grand jury assumed public aspects sufficient to warrant application of the required records exception?

III. Should a physician's participation in a public aid program be construed as an implied waiver of fifth amendment protection?

LIST OF PARTIES

All parties appear in the caption of the case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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Petitioner RICHARD A. HERBERT, prays that a writ of certiorari be issued to review the judgment of the Illinois Appellate Court upon which the Illinois Supreme Court, the highest Court of the State, denied leave to appeal.

CITATIONS TO OPINION BELOW

The opinion of the Illinois Appellate Court is reported as *People of the State of Illinois* v. *Richard A. Herbert,* 108 Ill. App. 3rd 143 (1982), and is attached as Exhibit A.

JURISDICTIONAL BASIS

On June 29, 1981 petitioner was held in contempt of court. The Illinois Appellate Court affirmed the judgment on July 20, 1982. A petition for leave to appeal to the Illinois Supreme Court was denied on October 5, 1982, and is attached as Exhibit B. Petitioner seeks a writ of certiorari pursuant to 28 U.S.C. 1257 (3).

STATUTES INVOLVED

U.S. Const. amend. V:

> [No person] shall be compelled in any criminal case to be a witness against himself . . .

STATEMENT OF CASE

On February 9, 1981, the February 1981 Grand Jury served to Richard A. Herbert, M.D., a subpoena *duces tecum* identifying Dr. Herbert as a target of an investigation of theft and violations of other Illinois statutes, and commanding him to appear before the Grand Jury and produce medical records of 46 patients. On February 26, 1981, Dr. Herbert appeared before the Grand Jury, but, citing his fifth amendment privilege against self-incrimination he declined to produce the requested documents. The Attorney General filed a petition for a rule to show cause, and later an amended petition. Before the court ruled on the matter, however, the term of the February 1981 Grand Jury terminated.

Thereafter, the June 1981 Grand Jury issued a fresh subpoena requesting the same documents sought previously by the February 1981 Grand Jury. Essentially, the Attorney General alleged in it's petition that Dr. Herbert was a target defendant in the grand jury's investigation of possible thefts from the Illinois Medicaid

Program and that since Dr. Herbert maintained the subpoenaed records pursuant to participation in the program the records fell within the "required records" exception to the fifth amendment privilege against self-incrimination. Accordingly, the Attorney General argued that Dr. Herbert could not invoke his privilege against self-incrimination.

At a hearing held on June 24, 1981, the Attorney General, while conceding that Dr. Herbert never signed any agreement specifically to maintain medical records of Medicaid recipients, argued that each time a physician submits a bill to the Illinois Department of Public Aid he impliedly agrees that he is subject to that department's reporting and record keeping requirements. On June 29, 1981 the court held that Dr. Herbert waived his fifth amendment privilege when he submitted himself to the general records requirements of the Illinois Medicaid Program. The court found Dr. Herbert in contempt of court for refusing to produce the medical records.

Dr. Herbert filed a timely notice of appeal to the Illinois Appellate Court on July 17, 1981. On July 20, 1982, after the case had been briefed and argued, the Illinois Appellate Court affirmed the trial judge's order. The panel agreed with the trial judge that the records sought fell within the "required records" exception to the fifth amendment privilege against self-incrimination. From this adverse decision, Dr. Herbert sought leave to appeal to the Illinois Supreme Court, which was denied. From their rulings he now seeks relief from the United States Supreme Court.

REASONS FOR GRANTING THE WRIT

THE TARGET OF A GRAND JURY INVESTIGATION CANNOT BE DEPRIVED OF HIS FIFTH AMENDMENT PRIVILEGE BY OPERATION OF A DOCTRINE FORMULATED TO PROMOTE THE EFFICIENT ADMINISTRATION OF PUBLIC AID PROGRAMS. FURTHERMORE, ANY WAIVER OF THE FIFTH AMENDMENT PRIVILEGE MUST BE KNOWING, VOLUNTARY, AND INTELLIGENT, RATHER THAN IMPLIED.

This Court has never directly decided whether the required records exception to the fifth amendment, first formulated in *Shapiro* v. *United States,* 335 U.S. 1 (1948), and later refined in *Grosso* v. *United States,* 390 U.S. 62 (1968), applies when the target of a grand jury investigation opposes a subpoena *duces tecum* by invoking his fifth amendment privilege. The decision below, affirming the trial court's contempt order, vastly expands the scope of the required records exception, and for the first time applies the exception in a grand jury context. Thus, the decision below requires review for several compelling reasons. First, to consider whether the required records exception should be applied in a grand jury context. Second, to prevent confusion in the courts below by determining the proper construction of *Grosso's* three prong test. Finally, review is necessary to reaffirm the previous decisions of this Court which have required that an effective waiver of fifth amendment rights be knowing, voluntary and intelligent.

A.

BECAUSE OF THE FUNDAMENTAL DIFFERENCE BETWEEN A GRAND JURY INVESTIGATION AND AN ADMINISTRATIVE AGENCY'S INVESTIGATION, THE REQUIRED RECORDS EXCEPTION TO THE FIFTH AMENDMENT SHOULD NOT BE APPLIED IN A GRAND JURY PROCEEDING.

As first formulated in *Shapiro* v. *United States*, 335 U.S. 1 (1948), the required records exception provided that record-keeping requirements which are imposed in aid of a valid regulatory statute render the documents maintained pursuant to that statute unprivileged in an investigation by the administrative agency charged with enforcing the regulatory program. *Shapiro*, however, in no way addresses the crucial issue of a grand jury's ability to compel production of a sole proprietor's documents. Certainly the focus of a grand jury's criminal investigation is vastly different than an administrative agency's regulatory investigation. Thus, the logic behind this Court's recognition of the required records exception, and the significant curtailment of fifth amendment protection it represents, is much more compelling when viewed as peculiar to the facts of the *Shapiro* case.

In *Shapiro*, this Court construed the immunity provisions of the Emergency Price Control Act. *Id.* at 5-6. After noting that the legislation before the Court had been enacted as an emergency measure necessary to the nation's war efforts, the Court went on to find that the purpose of the legislation was to empower the Administrator to compel the production of documents necessary in the administration and enforcement of the statute and regulations. *Id.* at 15. *Shapiro*, therefore, must be viewed as support for an administrator's broad powers to discern

compliance with administrative regulations in a time of extreme emergency. The thrust of *Shapiro* was not to emasculate the fifth amendment privilege of a target witness before a grand jury, but to prevent wholesale claims of privilege in response to administrative inquiry.

In contrast to the fifth amendment protection recognized in the context of an administrative proceeding under *Shapiro,* a target witness before a grand jury has significantly broader protection. It is a well-settled rule of law that the fifth amendment privilege against compulsory self-incrimination not only protects an individual from compelled production of his personal papers and effects, but also "applies to the business records of the sole proprietor . . ." *Bellis* v. *United States,* 417 U.S. 85, 87-88 (1974); *In Re Grand Jury Proceedings,* 601 F.2d 162, 168 (5th Cir. 1979); *United States* v. *Plesons,* 560 F. 2d 890, 893 (8th Cir. 1977). Moreover, it is beyond doubt that this fifth amendment privilege protecting the business records of a sole proprietor extends to grand jury proceedings. *United States* v. *Washington,* 431 U.S. 181, 186 (1977); *United States* v. *Plesons,* 560 F. 2d 890,892 (8th Cir. 1977).

The instant case illustrates the tension between a grand jury's investigative function and the well-recognized right of a grand jury witness to raise the fifth amendment as a bar to the production of documents. The interjection of *Shapiro's* required records exception into the grand jury process would serve only to upset the delicate balance between competing interests and tilt the scales overwhelmingly in favor of an accusatorial institution.

Unlike other aspects of the criminal justice system, a grand jury's inquiries are secret and roving. Dangerous

opportunities for oppression and unfairness abound due to the accusatorial character of a grand jury, and are compounded by the absence of judicial supervision. In contrast to the investigations of an administrative agency, which are a matter of public record and intended merely to detect practices at variance with administrative requirements, a grand jury investigation is shrouded in secrecy and may result in criminal indictment. Thus, the interests supporting the fifth amendment, such as protection against governmental coercion, encouragement of fair and complete law enforcement detection practices, and preservation of the adversarial nature of the criminal justice system, would be severly compromised if the required records exception is held to apply to the records of a grand jury target witness.

Independent of its ramifications on the grand jury process, the decision below enables Congress or a state legislature to emasculate the constitutional protection against self-incrimination by passing a regulating statute. This Court has repeatedly struck down such efforts by Congress in the past. *See e.g. Haynes* v. *United States,* 390 U.S. 85 (1968) (firearms regulation); *Grosso* v. *United States,* 390 U.S. 62 (1968) (wagering tax); *Marchetti* v. *United States,* 390 U.S. 39 (1968) (wagering tax). In each of those cases, this Court focused on the statutes and regulations that led to subpoenas to produce documents, just as *Shapiro* considered the act and regulations of the Emergency Price Control Act. In the cases cited immediately above, however, this Court struck down the efforts to acquire the documents because each piece of legislation evinced a thinly disguised subterfuge to compel individuals to waive their constitutional rights. Yet the decision below would sanction such legislation: if this

court should hold that a government agency such as a grand jury could acquire otherwise privileged documents simply because the agency charged with enforcement may be able to see those documents pursuant to its enforcement and maintenance functions, then a legislative body could obliterate fifth amendment protection through the subterfuge of simply passing a regulatory statute.

The required records exception, therefore, has no applicability to the records of a sole proprietor called to testify as the target of a grand jury investigation. Review of the decision below is necessary to ensure a proper balance between an individual's privilege against self-incrimination and society's interest in broad disclosure before a grand jury.

B.

REVIEW IS NECESSARY TO PREVENT CONFUSION IN THE COURTS BELOW.

In *Grosso* v. *United States*, 390 U.S. 62 (1968), this Court refined the required records exception and held that where an individual is required by the government to keep records, those records are subject to disclosure if the following three factors exist: (1) the purpose of the record keeping requirements must be essentially regulatory (2) the records must be of a kind customarily kept; and (3) the records themselves must have assumed public aspects. *Id.* at 67-68. Although Dr. Herbert does not quarrel with the articulation of the exception, he submits that the paucity of case law in this area induced the lower courts to misapply the exception when analyzing the facts in this case. Confusion regarding the application of *Grosso's* three prong test, however, is not limited to this case alone. The lower courts have been applying the *Grosso* test with widely disparate results.

In *United States* v. *LaPage*, 441 F. Supp. 824 (N.D.N.Y. 1977), the Defendants were ordered to surrender documents which they had maintained pursuant to the regulations of the New York Department of Agriculture and Markets. The *LaPage* court reasoned that the third prong of the *Grosso* test was met by virtue of the regulations that required the maintenance of the records sought by the government. Under the *LaPage* rationale, the regulatory statute which requires that records be maintained, thereby satisfying the first prong of the *Grosso* test, would also serve to imbue the records with public aspects sufficient to satisfy the third prong of that test. Such a construction renders the third prong a redundancy, and could never have been contemplated by the *Grosso* court.

A different analysis was utilized by the Eighth Circuit in *United States* v. *Plesons*, 560 F.2d 980 (8th Cir. 1977). In *Plesons*, a physician received a grand jury subpoena demanding patient records disclosing drug prescriptions. Although the defendant in *Plesons* failed to raise his fifth amendment privilege in a timely fashion, the court concluded that the records would have been privileged had he done so. Relying on *Bellis* v. *United States*, 417 U.S. 85 (1974), the *Plesons* court held that patient folders and their contents were privileged from disclosure. *United States* v. *Plesons*, 560 F. 2d 890, 893 (8th Cir. 1977).

Although the records sought by the grand jury in the instant case are of a type customarily kept by the Appellant, the other two prongs of the *Grosso* test have not been met. The purpose of the grand jury investigation is not regulatory: while the Illinois Medicaid Program's enforcement provisions exist to regulate the program, the grand jury seeks to identify criminal violators. Thus, the subpoena here should be quashed because it does not meet

Grosso's first prong that excepts records only where the purpose of the legislation is essentially regulatory. If this Court finds that the state requires these records as a check on possible criminal activity, then the records are not maintained for regulatory purposes and therefore do not fall within the required records exception. If the records are maintained to monitor compliance with the Illinois Medicaid Statute, then the only agency with any arguable right to view those records would be the Illinois Department of Public Aid. Simply because the right against self-incrimination may be arguably waived to enable the Department of Public Aid to monitor compliance with its provisions does not mean that a grand jury can now automatically view documents that would otherwise be protected.

Nor do the records sought here come under the third prong of *Grosso*, which requires that the records acquire "public aspects." The decision below bypassed this issue by holding that the records sought assumed public aspects because the Department of Public Aid could inspect the records for documentation of claims and analysis of the operation of the Medicaid system. Under this reasoning, documents required to be kept would automatically be considered "public records," rendering the third prong of *Grosso* superfluous. In *Grosso*, this Court held that simply because the documents were desired by the government did not render the information "public." *Grosso* v. *United States*, 390 U.S. 62, 68 (1968). Thus, the "public aspects" requirement must have meaning additional or apart from the other prongs of the "required records" exception.

The instant case involves medical records which are among the most private of documents. Patients expect that information disclosed to their physicians will remain confidential, and Illinois has expressed its concern for this confidentiality through the enactment of a law that authorized disclosure only in narrowly delineated circumstances. Thus, the records sought by the government in the instant case contrast starkly with cases where the records required are not ordinarily shrouded in privacy. Records containing private medical information cannot be classified as records having "public aspects" merely because the records are maintained to satisfy agency reporting requirements.

Therefore, the records in question do not have "public aspects," and the decision below requires review to prevent a significant expansion of the required records exception, and a concomitant curtailment of fifth amendment protection.

C.

ANY WAIVER OF THE FIFTH AMENDMENT PRIVILEGE MUST BE KNOWING, VOLUNTARY, AND INTELLIGENT, RATHER THAN IMPLIED.

Although the decision below did not specifically address the issue, the trial court held that the Petitioner impliedly waived his privilege against self-incrimination when he participated in the Illinois Medicaid Program. That holding ignores this Court's consistent pronouncements that waivers of constitutional rights must not only be voluntary but must be "knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady* v. *United States*, 397 U.S. 742, 748 (1970); *accord*, *People* v. *Johnson*, 75 Ill. 2d 180, 187, 387 N.E. 3d 688 (1979).

Nothing in the record of the case at bar indicates that the petitioner knowingly waived his rights. The mere act of participation in a public aid program cannot put a physician on notice that his continued participation will result in a waiver of his privilege against self-incrimination. *Cf. Morgan* v. *Thomas,* 448 F. 2d 1356, 1363 (5th Cir. 1971) (privilege could not be waived by prior contract which did not contemplate circumstances under which exercise of the privilege would be appropriate.)

The rationale advanced by the trial court would allow a state to condition a physician's participation in a public aid program on the physician's consent to waive his fifth amendment privilege. The Court has repeatedly rejected this notion in the past, reasoning that a waiver of the fifth amendment which is secured by the exaction of a price is compelled and ineffective. *Garrity* v. *New Jersey,* 385 U.S. 493, 500 (1967). If a person is forced to choose between waiving his fifth amendment privilege or foregoing another substantial benefit, there is no choice at all. *Davis* v. *Wainwright,* 349 F. Supp. 39, 42 (M. D. Fla. 1971). *See also Lefkowitz* v. *Turley,* 414 U.S. 70, 82-83 (1973) (Where a substantial economic sanction is used to secure a waiver, the waiver is not voluntary).

In the instant matter, review is necessary to prevent a gross deviation from this Court's previously delineated standard. The Petitioner could never have impliedly waived his privilege against self-incrimination. Such a "waiver" is deficient because it operates independent of any actual knowledge on the part of the person claiming that privilege, and because it conditions participation in a state sponsored program on a consent to waive a fundamental constitutional right.

CONCLUSION

For the foregoing reason, Petitioner respectfully requests that a writ of certiorari be issued to review the judgments below.

Respectfully submitted,

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